U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

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FILE: LIN 02 047 52556 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant
> which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on May 3, 2000. The proffered salary as stated on the labor certification is $7.65 per hour which equals $15,912 annually.

With the petition, the petitioner submitted no evidence of the petitioner's ability to pay the proffered wage. On February 19, 2002, the Nebraska Service Center requested evidence pertinent to the petitioner's continuing ability to pay the proffered wage. Specifically, the petitioner was requested to submit its 2000 tax return.

In response, the petitioner submitted a copy of its 1120S Income Tax Return for an S Corporation forms for the 2000 and 2001 calendar years. The 2000 return stated that the petitioner suffered a loss in that year of $23,569, paid $42,000 in compensation of officers and $5,695 in salaries and wages. The accompanying Schedule L showed that, at the end of the same year, the petitioner's current assets were less than its current liabilities.

The 2001 return stated that the petitioner suffered a loss of $16,992 during that year, paid $38,200 in compensation of officers and $8,400 in salaries and wages. The associated Schedule L shows that, at the end of that year, the petitioner's current assets were less than its current liabilities.

The petitioner submitted a letter from its owners to the Service Center. That letter, dated March 12, 2002, stated that the petitioner's president wished to retire on November 1, 2002, and that his wife will also no longer work for the petitioner, thus freeing additional funds to be applied to the proffered wage. A sworn affidavit from the petitioner's president attested to the same facts.

The petitioner submitted 2001 Federal Form W-2 wage and tax statements for the petitioner's president and the president's wife and their joint Form 1040 tax return. Those statements indicate that, during that year, the petitioner paid its president wages of $16,100 and his wife wages of $3,150, for a total of $19,250.

The petitioner submitted unaudited Profit and Loss Statements for 2000 and 2001. Those statements were compiled by a licensed accounting practitioner. The cover letters included with those statements note that the compiling practitioner expresses no opinion pertinent to the accuracy of the statements. The practitioner further noted that petitioner opted to omit substantially all of the disclosures ordinarily included in financial statements and that, if those disclosures were included, they might influence the user's conclusions about the petitioner's assets, liabilities, revenue, and expenses.

The statement for the 2000 calendar year, indicates that, during that year, the net cash provided by the petitioner's operating activities was -$23,357.23. The 2001 statement indicates that the petitioner's net cash from operating activities was -$14,635.40. The petitioner also submitted statements pertinent to its bank accounts. Those statements are discussed below.

On May 31, 2002, the Director, Nebraska Service Center, found that the evidence provided did not demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition.

On appeal, counsel argues that the petitioner submitted evidence that it had the ability to pay the proffered wage. Specifically, counsel notes that two employees whom the petitioner claims will be replaced by the beneficiary were paid an amount in excess of the proffered wage.

In addition, counsel argued that certain adjustments to the petitioner's income are necessary to more truly reflect the petitioner's ability to pay the proffered wage. Specifically, counsel argued that the amount of the petitioner's claimed depreciation and interest expenses must be added to income to show the cash actually available to pay the proffered wage.

In addition, counsel stated that the petitioner is able to borrow $25,000, and that those funds, too, could be used to pay the proffered wage. In support of that assertion, counsel submitted a letter from an officer of a commercial lending institution stating that the petitioner and the partners "are eligible for $25,000." That letter's meaning is unclear. That letter does not state that the petitioner and partners have an outstanding line-of-credit in that amount or, if they do, what the current balance of that account is. If the petitioner does not currently have a line-of-credit, then the evidence upon which the bank officer based his statement that one would be made available to the petitioner, upon request, is unclear.

Counsel's reliance on the amount of the petitioner's depreciation deduction is misplaced. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1080 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to present purpose, nor treat it as a fund available to pay the proffered wage.

The amount necessary to service loans from shareholders is also unavailable to pay the proffered wage. Although the shareholders may not require payment in a given year, that interest is due and, if not paid, becomes a debt. That the petitioner is able, temporarily, to select certain obligations to be paid and others to be deferred does not indicate that this position can be sustained. The petitioner must show the ability to pay the proffered wage out of its own funds.

Similarly, a line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

The only remaining argument pertains to the amounts paid to the two workers whom the petitioner states will be replaced by the beneficiary. Counsel argues that the beneficiary will replace the two current employees. As such, the $19,250 they were paid will be available, after the beneficiary is hired, to pay the proffered wage. In support of that position, the petitioner cites the letter that states that the president of the company wishes to retire as of November 1, 2002.

The priority date of this petition is May 3, 2000. The petitioner must demonstrate the ability to pay the proffered wage from that day forward. The desire of the president to retire from active involvement in operation of the petitioner shows the ability to pay the proffered wage as of November 1, 2002. None of the evidence in the record, however, demonstrates the ability of the petitioner to pay the proffered wage from May 3, 2000 to November 1, 2002, either from earnings, or from net current assets, or from any other source.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage from May 3, 2000 to November 1, 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered salary beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.